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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

IN THE MATTER OF THE ESTATE OF DAISY WARE BEACH, Osage Allottee No. 719, Deceased.

GLADYS NAOMI WARE, an incompetent person, by JOHNNIE MOHON, her legal guardian, and JOHNNIE MOHON, as legal guardian of GLADYS NAOMI WARE, an incompetent person, *Petitioners,*

VERSUS

BERNARD E. BEACH.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Gladys Naomi Ware by Johnnie Mohon, and Johnnie Mohon as legal guardian of Gladys Naomi Ware, an incompetent person, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma entered in this case on March 20, 1958.

OPINIONS BELOW

The order of the County Court, Osage County, Oklahoma containing the findings and conclusions of the Court of December 3, 1952, is unreported. It appears in the appendix, pp. 11a-19a.

The District Court, Osage County, Oklahoma, upon trial *de novo* entered its ordering containing findings and conclusions dated January 5, 1954, which is unreported but which appears at pp. 19a-22a of the appendix.

The opinion of the Supreme Court of Oklahoma is reported in 322 P. 2d 635 and appears at pp. 23a-35a of the appendix.

JURISDICTION

The opinion of the Supreme Court of Oklahoma was announced June 25, 1957. App. 23a. A timely petition for rehearing was filed, set for oral argument, argued in January, 1958, and denied February 18, 1958. App. 35a, 39a-40a. Pursuant to rules of the Supreme Court of Oklahoma, application for leave to file second petition for rehearing was denied March 11, 1958. App. 36a.

An order to issue the mandate was entered March 20, 1958, but enforcement of the mandate in the trial court was stayed. App. 36a. The mandate itself was issued March 20, 1958 (App. 36a), which marks the date the judgment became final under the practice in the Supreme Court of Oklahoma. See motion for clarification of judgment (App. 37a) and the order of the court below clarifying date of final judgment. App. 39a.

The issue of timeliness which might otherwise be raised on these facts under *Gypsy Oil Co. v. Escoe, etc.*, 275 U.S. 498, is thus disposed of by the authoritative ruling of the court below, App. 39a, as to its own practice respecting final judgment, which was stated by that court after the *Gypsy Oil* case had been specifically brought to its attention. App. 38a. The practice of applying for a second petition for rehearing is specifically provided for by Rule 29 of the rules of the court below and provision is made (Rule 33) for delaying issue of the mandate until that second application is disposed of. App. 3a.

The court below orders (App. 40a) that "the judgment in the above-styled cause became final on the 20th day of March, 1958, said date being the date of issuing of the mandate to the trial court in said cause." If that statement of the court below be respected, time within which to apply for a writ of certiorari would expire 90 days after March 20, so that the last day for timely filing of a petition for certiorari or application for extension of time would be June 18, 1958. However, referring to its denial of the application for leave to file a second petition for rehearing, the court below states in the same order—

> "That all steps authorized before the entry of a judgment had then [March 11, 1958] been exhausted, and this Court as provided by rule 33 of this Court [App. 3a] issued its judgment in said cause which is a part of its mandate dated March 20, 1958."

The statement that all steps authorized prior to entry of judgment had been exhausted March 11, 1958 (together with the reference to "entry" of the final judgment, the controlling fact under § 2101(c) of the Judi-

cial Code) led counsel to apprehend that perhaps the determinative date was March 11, 1958, when the application for leave to file a second petition for rehearing was denied. If that date controls, then the last day for timely filing would be June 9, 1958. Out of abundant caution, counsel filed with the Clerk of this Court on June 9, 1958, an application for extension of time, which was granted by Mr. Justice Whittaker on June 10, 1958, to and including June 23, 1958, "provided the statutory time has not already expired." App. 41a.

The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is § 1257(c) of the Judicial Code.

QUESTION PRESENTED

Whether (notwithstanding state law as to vesting of decedents' estates) Congress has power to provide, as to the estate of a deceased, restricted Osage Indian held in trust by the United States, that the restricted estate shall not go to a surviving spouse who fails to show Indian ancestry in a manner prescribed by Congress to forestall non-Indian "social prospectors" from acquiring Osage trust property through marriage.

STATUTES INVOLVED

Pertinent portions of the statutes involved are set forth in the separate appendix, App. 1a-2a.

STATEMENT

In 1925 Congress provided that for the future "none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe" any interest in "any restricted lands, moneys,

or mineral interests of the Osage Tribe." Act of February 27, 1925, App. p. 2a. Thereafter, in 1934, Daisy Ware Beach, a fullblood, restricted Osage Indian, married respondent. App. 11a. By her will of 1946 (approved by the Secretary of the Interior as required by Act of April 18, 1912, App. 1a-2a, to be effective), she disinherited her husband with a $1 bequest. She died May 18, 1949.

While the probate proceeding of the estate of Daisy Ware Beach was pending but before the question of fact of Indian blood of the husband was even asserted by respondent husband, Congress amended the 1925 Act referred to above to add the following proviso (Act of September 1, 1950, App. 2a): ". . . *Provided,* That (except in cases where a person claiming as such heir is a party to judicial proceedings pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States, and is enrolled on a membership, census, or other roll prepared under direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled . . ."

When Congress adopted this provision respondent had not filed a formal pleading alleging Indian blood. In the hearings below he made no effort to establish that he was enrolled on a roll prepared under the direction of the Secretary of the Interior or had a lineal ancestor so enrolled as required by the Act of September 1, 1950. App. 27a.

The federal question was raised in answer to a petition for determination of the heirs which had been

filed by an administrator *c.t.a.* and respondent husband on July 16, 1951. App. 8a. The answer, filed March 24, 1952, in paragraph 3 specifically set up the Acts of Congress of February 27, 1925, and September 1, 1950, and in paragraph 4 showed that respondent had never filed a formal pleading alleging that he is of Indian blood, and denied his right to share as an heir unless he establishes his United States citizenship and that he is of Indian blood and enrolled on some roll prepared under the direction of the Secretary of the Interior or had an ancestor so enrolled. App. 10a.

The probate court (County Court of Osage County, Oklahoma) held in paragraph 11 of its findings (App. 14a, 15a) that decedent left as her next of kin and sole and only heirs of law her husband (respondent) and an adopted son, "but that the said Bernard Beach [respondent] is not of Indian blood and under the Acts of Congress is entitled to inherit no portion of the restricted estate of his said deceased wife . . ." In paragraph 13 (App. 16a) the court found and held: "That the surviving husband, Bernard E. Beach, filed herein his election to take against said will and under the laws of the State of Oklahoma, but that the said Bernard E. Beach is not of Indian blood and under the Acts of Congress is entitled to inherit no portion of said restricted estate; . . .": Similar language appears in the decree portion of the order. App. 18a. As a result, the court held that the estate vested in decedent's sister, the residuary legatee and devisee under the will.

On trial *de novo* in the District Court of Osage County, Oklahoma the court held the issues generally in favor of respondent surviving husband, finding that it had been proved that the grandfather of respondent was of Indian blood (App. 20a), holding that respond-

ent "is, under his election to take under the laws of descent and distribution of the State of Oklahoma, entitled to and did inherit one-half of the estate of the said decedent." (App. 21a).

The Supreme Court of Oklahoma gave extensive consideration to the federal question. It acknowledged that respondent had not complied with the act of September 1, 1950 (App. 27a), and held:

> "It is well established in this jurisdiction that property descends upon death and vests immediately in the heirs, legatees and devisees, subject only to control of the county court for purposes of administration. [Citing authorities.] Since one has a vested right in property to which he succeeds under the law of descent and distribution or under the will of a decedent immediately upon the death of the decedent, it follows that an estate must be distributed among heirs and distributees according to the law as it exists at the time of death of the decedent. [Citing authorities.]
>
> We are therefore of the opinion and hold that the right of Bernard Beach, as surviving spouse, to succeed to his statutory share of the estate of Daisy Ware Beach, deceased, vested immediately upon the death of Daisy Ware Beach in 1949, and is controlled by the substantive law pertaining thereto as it existed at that time, namely, the Act of Congress of February 27, 1925, above quoted, as it existed prior to the 1950 amendment, supra. The amendment of September 1, 1950, is not applicable to this case and the trial court did not err in so holding."

REASONS FOR GRANTING THE WRIT

When Congress provided in 1950 (Act September 1, 1950, App. 2a) that to prove "Indian blood" as required by the 1925 act a claimant to inheritance from

an Osage must do so by proving his enrollment as an Indian or enrollment of a lineal ancestor, the purpose of the amendment was stated by the House committee as follows (H. REPT. No. 2913, 81st Cong., 2d Sess.):

> "... This apparently was the real intention of the present law enacted in 1925, but a loophole was found whereby hearsay evidence could establish the degree of Indian blood and relationship.
>
> "There have been a number of instances of prolonged and extensive litigation over the right to inherit by claimants under the 1925 act, ...
>
> "Also, the wealth of the Osage Indians has attracted 'social prospectors' who would like to marry into the tribe for purely mercenary reasons. As a matter of fact, experience and practice has shown that, under the present law, advantage has been taken by unscrupulous people, and that apparent effort has been made on the part of certain white people to come into the tribe by intermarriage simply for the purpose of acquiring property.
>
> "It is the opinion of the Public Lands Committee that the present law has been subjected to grave abuse, and that there is definitely a need for making clear the method of making proof of heirship. ..."

As an indication of its broad sweep, Congress stated that the new act did not exclude pending judicial proceedings except "those in which the claimant has filed a formal pleading alleging Indian blood." This pending proceeding was not in the excepted class. Therefore this case was squarely within the class of Osage estates to which Congress was attempting to give the protection of the new act. The court below has ruled that attempt "inapplicable" because of a vesting of the estate at the time of death.

The notion that the property of restricted Indians in some manner "vests" under state law so that the United States is without power to grant protection to the Indian property is not advanced for the first time in this case. It was asserted as to the Osages themselves (decedent here having been a fullblood Osage) in *United States* v. *Osage County*, 251 U.S. 128, 132. There Osage lands had been allotted to the individuals in 1906 and certain of those lands made subject to state and local taxation. The attention of Congress having been called to overassessments on those lands in comparison with the lands of non-Indians, Congress by Act of March 2, 1917, authorized an appraisement by the Secretary of the Interior and the fixing of the extent of the overassessment. Of the argument that state law had become applicable so that the federal statute could not apply, Chief Justice White noted that "it proceeds upon the assumption that by the Act of 1906 the United States exhausted its power as the protector and guardian of the Osage Indians and as to them had no longer any mission or authority whatever. We pass from this contention without further notice, as it is so obviously opposed to the doctrine upon the subject settled from the beginning and so in conflict with the terms of the act of Congress that nothing more need be said concerning it." The Court referred to the position of "the United States as guardian of the Indians" and its "duty to protect them from spoliation." p. 133.

In *Gritts* v. *Fisher*, 224 U.S. 640, an act of Congress in 1902 had provided for a permanent enrollment of Cherokees, for an appraisal of tribal land, specifically provided that the enrollees should alone be entitled to share in the distribution and that no child born after the date of the act should be entitled to share. Not-

withstanding that, in 1906 Congress reopened the roll to permit the "too-late babies" (those born after the 1902 cut-off date and up to April, 1906, and for 90 days thereafter) to be enrolled and to share. While this Court did not doubt that the 1902 Act contemplated that the 1902 enrollees alone should receive the remaining properties of the tribe, it held that this did not constitute such a vested right as would disable Congress from making provision for the allotment and distribution to the newly born members. This Court cited a number of cases.

The properties here involved are trust properties; and their disposition, this Court has held, is governed by federal law: "Congress provided that the lands should descend and directed how the heirs should be ascertained. It adopted the provisions of the Oklahoma statute as an expression of its own will—the laws of Missouri or Kansas, or any other State, might have been accepted. The lands really passed under a law of the United States, and not by Oklahoma's permission." *Childers* v. *Beaver,* 270 U.S. 555, 559.

While the issue in this case is one of the power of Congress to affect a pending proceeding relating to Indian trust property as it purported to, rather than *whether* it so intended, the case otherwise bears considerable resemblance to *Blanset* v. *Cardin* (C.C.A. 8th, 1919), 261 Fed. 309, which this Court affirmed, 256 U.S. 319. There, too, a husband sought to renounce the will of a restricted Oklahoma Indian and take a surviving spouse's distributive share; there, too, it was asserted that Oklahoma law vested the right in the surviving husband at the instant of death, so that approval of the Indian will by the Secretary of the Interior in accordance with federal statute did not deprive him

of the property which had been freed of restriction by the death. Each court which passed upon it found against this contention. The Court of Appeals noted (261 Fed. at p. 312)—

> "... Congress was well advised that unworthy and designing persons sometimes contract marriages with Indians with a view to obtaining the benefit of the property which the United States has granted to the Indians and that the right of a testator or testatrix to select devisees, and the right of the Interior Department to disallow any will, would often afford needed protection to dependent and natural heirs against the waste of the estate as the result of an unfortunate marriage and enforced inheritance by state laws. ..."

This Court agreed. 256 U.S. at p. 326.

The decision of the court below may be founded on disagreement with the policy of Congress in the 1950 legislation; for it says (App. 28a)—

> "There are many persons who are undeniably of Indian blood who are not enrolled on any roll prepared under the direction of the Secretary of the Interior and who have no lineal ancestor so enrolled. On the other hand, many intermarried whites and negro freedmen were made members of the various Indian tribes and were enrolled on the tribal rolls even though not a single drop of Indian blood flowed through their veins. Obviously, then, the possession of Indian blood and the appearance of the name on the rolls above referred to are not synonymous, and the proof of one would not constitute the proof of the other. ..."

If so founded, the decision below conflicts with the holding of this Court in *Campbell* v. *Wadsworth*, 248 U.S.

169, 178, likewise involving the review of the court below on an Indian probate matter. There the court below had indicated its dissatisfaction with an Act of Congress embodying the Seminole Agreement of 1899, and as a result had interpreted it to mean otherwise than it rather plainly said. This Court concluded—

> "All statutes of descent and distribution are arbitrary expressions of the purpose of the law-making power; and that the provisions of such a statute do not happen to meet the notions of justice of a court is not sufficient reason for indulging in an interpretation which modifies their plain and unambiguous terms. Especially is this true of these Indian statutes which are a progressive development, embodying concessions to tribal custom and tradition necessary to be made in order to accomplish a practical, though perhaps not an ideal, dissolution of the tribal relation and distribution of the tribal property."

CONCLUSION

The writ should be granted.

Respectfully submitted,

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